PUBLIC REDACTED FILING

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

CIVIL ACTION NO.: 2018 CA 008715 B
Judge Fern Flanagan Saddler
Next Court Date: March 22, 2019
Event: Initial Conference

DEFENDANT FACEBOOK, INC.'S OPPOSED MOTION TO SEAL

Defendant Facebook, Inc. moves pursuant to Superior Court Rules of Civil Procedure 5-III and 12-I for an order to seal the documents the District has submitted *in camera* as Attachments A and B to Exhibit 4 to its opposition to Facebook's Motion to Dismiss. *See* District Opp. to Mot. to Dismiss, Ex. 4, Attachments A and B (Mar. 1, 2019). The documents should remain under seal because they contain confidential commercial information, and public disclosure would harm Facebook by revealing internal business information. In addition, public disclosure of the documents would contravene confidentiality obligations assumed by the District prior to receiving the documents at issue. Moreover, the disclosure would be particularly inappropriate at this stage of the litigation because it cannot properly be considered by the Court in resolving Facebook's Motion to Dismiss.

Facebook also moves to file under seal certain passages of the Memorandum of Law in Support of the Motion to Seal that discuss the contents of the confidential documents at issue.

Dated: March 11, 2019

Respectfully submitted,

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Attorneys for Defendant

Pursuant to Superior Court Rule of Civil Procedure 12-I, 26(h)(1) and 37(a)(1)(B), I hereby certify that Facebook ascertained whether Plaintiff would consent to the relief sought before filing this motion. Counsel for Facebook and the District conferred regarding the motion and possible resolution on March 5 and March 8, 2019. Despite diligent efforts, consent could not be obtained.

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK, INC., *Defendant*.	CIVIL ACTION NO.: 2018 CA 008715 B Judge Fern Flanagan Saddler Next Court Date: March 22, 2019 Event: Initial Conference

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FACEBOOK, INC.'S OPPOSED MOTION TO SEAL

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PUBLIC REDACTED FILING

Defendant Facebook, Inc. ("Facebook") respectfully requests an order to seal the two documents (collectively, the "Document")[1] attached to Exhibit 4 to the District's opposition to Facebook's Motion to Dismiss (Mar. 1, 2019).

I. INTRODUCTION

The District would like to publicly disclose an internal Facebook document that the District obtained pursuant to a pre-suit subpoena during the nearly year-long investigation that preceded this lawsuit. In connection with that subpoena, the District agreed that it would not publicly disclose confidential documents produced by Facebook in response to the subpoena unless the District was legally required to do so under the Freedom of Information Act ("FOIA"). Nevertheless, the District submitted one of Facebook's confidential documents to the Court *in camera*, purportedly in support of its opposition to Facebook's Motion to Dismiss, and advised Facebook on March 1, 2019 that it would also file the Document in full on the public docket unless Facebook filed an affirmative motion to seal.

Facebook seeks a sealing order to preclude the public disclosure of the Document because it contains sensitive and confidential business information, [redacted][2] Courts recognize that sealing a document is proper when a document reveals confidential commercial information—including information showing a company's internal processes—because public disclosure could result in competitive harm to the company. FOIA has similar protections to avoid the unwarranted disclosure of sensitive business information that does not belong in the public domain.

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[1] Attachments A and B to Exhibit 4 to the District's opposition to Facebook's Motion to Dismiss are versions of the same document. Attachment A is the bates-stamped version. Attachment B is the native version. Facebook's motion requests that both Attachments A and B remain under seal.

[2] Several portions of this Motion to Seal discuss the contents of the Document at issue, and Facebook accordingly requests that that the Court order those portions of this brief to be filed under seal, as well as any portions of the District's response brief that quote from or otherwise disclose the contents of the Document.

Although the District seeks to override these protections, there is no basis to do so here, particularly since the District specifically vowed to maintain confidentiality over the Document at issue. Moreover, even recognizing the general public interest in transparency in the legal system, the Document should not be disclosed in these circumstances because the District has no legal basis to introduce the Document into the record at this stage of the proceedings. The District seeks to rely on the Document to bolster its argument that the Court has personal jurisdiction over Facebook, but the facts purportedly supported by the Document were never *alleged* in the Complaint, so the Court cannot consider the Document at this stage in any event.

Accordingly, the Court should grant Facebook's request for a sealing order to prevent the District from improperly disclosing Facebook's confidential business information. If the Court denies Facebook's request and permits the District to publicly disclose this confidential Document, Facebook requests that it have an opportunity to redact certain components of the Document prior to its publication.

II. BACKGROUND

Following the March 2018 news articles regarding Cambridge Analytica, nearly 40 state attorneys general, including the District's, began investigations regarding Facebook's data practices and the Cambridge Analytica events. As part of its investigation, the District issued a document subpoena, in response to which Facebook produced 130,000 pages of documents.

Soon after the investigation began, Facebook raised questions about whether the public would be able to inspect the documents it turned over in response to the District's subpoena. The District assured Facebook that the documents would not be publicly distributed and "agree[d]" to binding "confidentiality terms," which the District memorialized in a letter to Facebook. Decl. of Joshua Lipshutz ("Lipshutz Decl."), Ex. 1 (Mar. 11, 2019). Under the terms of that letter agreement, the District agreed that it would not publicly disclose documents produced in response to the subpoena and marked as confidential unless it was "obliged to produce such record under the Freedom of Information Act"—and even then, that it would give Facebook ten

days' notice before disclosure. *Id.* The District also agreed "not to share any document produced by Facebook in response to the Subpoena that is marked as confidential with any other state, federal, or local agency" unless the agency separately agreed to comply with the confidentiality agreement's terms. *Id.*

The Document at issue in this motion is one of the documents Facebook produced in response to the District's subpoena. [redacted] When Facebook produced the Document, it informed the District that it was confidential, "and should be maintained in confidence" by the District, "used *solely* for the purposes of this inquiry, and not shared with any other entity." Lipshutz Decl., Ex. 2 (Mar. 11, 2019) (emphasis added). Facebook further stamped the document "CONFIDENTIAL TREATMENT REQUESTED" on each page, *see* District Opp. to Mot. to Dismiss, Ex. 4, Attachment A (bates-stamped copy of the Document), and expressly requested "prompt notification in the event your office contemplates disclosure of any of the information produced herewith." Lipshutz Decl., Ex. 2 (Mar. 11, 2019).

In late 2018, over eight months into its investigation, the District filed this lawsuit, alleging that Facebook's conduct relating to user data has violated the CPPA, D.C. Code § 28-3904. *See* Compl. (Dec. 19, 2018). The District attached no exhibits or other outside material to its Complaint.

On February 1, 2019, Facebook filed a Motion to Dismiss the District's Complaint, seeking dismissal on the ground, among other things, that the Court lacks personal jurisdiction over Facebook. Facebook argued that the Complaint's *only* allegation connecting Facebook to the District is the unremarkable fact that Facebook supplies social networking services to D.C. residents who download Facebook. *See* Mem. of Law in Support of Mot. to Dismiss 7 (Feb. 1, 2019). As numerous courts have held, however, that allegation is not sufficient to meet the constitutional demands of personal jurisdiction. *Id.* at 7-9.

On March 1, 2019, the District filed its opposition to Facebook's Motion to Dismiss. The District attached four exhibits. The fourth exhibit, a declaration from Marta M. Parvano, attached the Document (in bates-numbered and native forms, as Attachments A and B, respectively), which the District asserts supports its theory that Facebook is subject to personal jurisdiction in D.C. The District informed Facebook that same day by email that, although the Document was designated confidential by Facebook and produced to the District pursuant to their confidentiality agreement, it believed the Document should be filed publicly, and instructed Facebook that it would do so unless Facebook promptly moved to seal the Document. In the interim, the District and Facebook agreed that the Document would remain under seal until the Court ruled on this Motion to Seal.

III. ARGUMENT

A. The Document Contains Sensitive Commercial Information That Should Remain Confidential.

This Court has broad discretion to order the sealing of any document. *See, e.g.*, *Johnson v. Greater Se. Cmty. Hosp. Corp.,* 951 F.2d 1268,1277 (D.C. Cir. 1991) (sealing decision is "best left to the sound discretion of the trial court") (quoting *United States v. Hubbard,* 650 F.2d 293, 316-17 (D.C. Cir. 1980)). Although the public right of access is a common law tradition (generally serving to promote government transparency), the right of access is "not absolute." *J.C. v. District of Columbia*, 199 A.3d 192, 207 (D.C. 2018). For example, the presumption of access in civil cases "is more easily overcome by reasons favoring secrecy" than in criminal cases. *Mokhiber v. Davis*, 537 A.2d 1100, 1108 (D.C. 1988). In addition, the presumption of access is weaker as to pretrial filings than materials presented at trial because "[p]retrial documents are not critical to promoting trial understanding and may contain prejudicial and sensitive material that would be inadmissible at the trial itself." *Id.*

In determining whether to exercise its discretion to seal a document from public disclosure, this Court applies a six-factor test, just as D.C. federal courts do, which evaluates:

(1) the need for public access to the documents at issue;

(2) the extent to which the public had access to the document prior to the sealing order;

(3) the fact that a party has objected to disclosure and the identity of that party;

(4) the strength of the property and privacy interests involved;

(5) the possibility of prejudice to those opposing disclosure; and

(6) the purpose for which the documents were introduced.

J.C., 199 A.3d at 207. Each of these factors applied to the facts of this case plainly favors keeping the Document at issue under seal.

1. The need for public access to the Document at issue. The need, if any, for public access to the Document at issue is minimal at best. Indeed, courts have recognized that while documents such as court orders and party *briefs* are generally a matter of public concern, "documents filed with the court or introduced into evidence"—like the Document here, a simple exhibit to support a pretrial filing—"often have a private character, diluting their role as public business" and favoring confidentiality. *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996).

Moreover, any need for public access to the Document here is negated by the need to maintain confidentiality over sensitive internal business records. That is because "keeping commercial secrets" is "fundamental . . . to the proper functioning of the economy" and is "itself important to the public interest." *Steinbronn v. Times Aerospace USA LLC*, 2010 WL 8742283 (D.C. Super. Ct. June 21, 2010). As the D.C. Court of Appeals has explained, "courts have long recognized that information of certain kinds may be more readily closed from public view, such as commercial . . . secrets." *Mokhiber*, 537 A.2d at 1115. Courts have also recognized that sealing is appropriate where disclosure would reveal "information explaining [a company's] internal processes" and "detailed discussions of [its] internal procedures." *U.S. Commodity Futures Trading Comm'n v. Whitney*, 441 F. Supp. 2d 61, 72-73 (D.D.C. 2006) (granting motion to seal); *see also United States v. Anthem, Inc.*, 2017 WL 8893757, at *2. (D.D.C. 2017) (granting motion to seal where disclosure "would provide competitors with unjustified insight into Anthem's provider rates, pricing, marketing analysis, new products, and strategic plans").

D.C.'s FOIA law—which the District agreed applied to Facebook's document productions—reflects a similar policy against disclosure of sensitive commercial information to the general public. Section 2-534 of the D.C. Code provides that "[t]rade secrets and commercial or financial information obtained from outside the government" "may be exempt from disclosure" if disclosure "would result in substantial harm to the competitive position of the person from whom the information was obtained." This protected information includes documents that would reveal the "inner workings of [a company's] business" that, if released publicly, could provide "a potential windfall for competitors." *100Reporters LLC v. U.S. Dep't of Justice*, 248 F. Supp. 3d 115, 140, 142 (D.D.C. 2017) (barring disclosure under FOIA of documents that would "provide competitors with a roadmap of aspects of Siemens' best-in-class compliance system and allow those competitors to make affirmative use of the program . . . without incurring the substantial investment cost Siemens has incurred").

Here, the Document contains sensitive commercial information regarding the "inner workings" of Facebook's business that should be protected against disclosure. [redacted] also could provide competitors with valuable insights into how Facebook operates. *See 100Reporters LLC*, 248 F. Supp. 3d at 142. The general public itself has little or no interest in this Document that could warrant exposing Facebook to the risks that would inevitably accompany disclosure.

2. The extent to which the public had access to the Document. "Previous [public] access is a factor which may weigh in favor of subsequent [public] access"; conversely, no previous public access weighs *against* disclosing the document during litigation. *Hubbard*, 650

F.2d at 318. Here, as far as Facebook is aware, the Document had not been released to the public prior to the District's attempt to include it in the record of this case and disseminate it publicly.

Facebook, for its part, takes great efforts to maintain confidentiality as appropriate over internal communications between or among its employees, and/or affecting its clients and business partners. To that end, Facebook has not publicly disseminated the Document or its contents and, given its confidentiality, has sought assurances from any government agencies or entities to whom it has produced the Document that they too would maintain its confidentiality. That is precisely what the District agreed to do in its letter to Facebook, Lipshutz Decl., Ex. 1 (Mar. 11, 2019), which is directly contravened by the District's attempts to disclose the Document publicly through this litigation. As a result, disclosing the information now would be an "inequity," because Facebook "acted in reliance on continuing confidentiality." *Mokhiber*, 537 A2d at 1116 (holding existence of settlement agreement "provi[ding] for maintaining" the secrecy of the documents at issue "must play a central role in weighing the interests favoring continued secrecy" and is "an important factor weighing against disclosure").

3. The identity of the party objecting to disclosure. "[T]he fact that a party moves to seal the record weighs in favor of the party's motion." *Zapp v. Zhenli Ye Gon*, 746 F. Supp. 2d 145, 149 (D.D.C. 2010); *United States ex rel. Durham v. Prospect Waterproofing, Inc.*, 818 F. Supp. 2d 64, 68 (D.D.C. 2011) (when a party objects to disclosure, "this factor favors sealing").

Facebook is a party to this action, which weighs in favor of its motion. But, significantly, Facebook is also a party to or involved with multiple other legal and regulatory proceedings that could be adversely affected by disclosure of the Document. For example, Facebook is a party to a multidistrict litigation pending in the Northern District of California and is subject to an ongoing, confidential investigation by the U.S. Federal Trade Commission. *See* Mem. of Law in Support of Mot. to Dismiss 4-5. Due to the overlapping issues in those proceedings and this one, disclosure of the Document in this action over Facebook's objection could implicate other proceedings, which have their own distinct and binding confidentiality obligations.

4. The strength of the property and privacy interests involved. As explained above, Facebook has strong privacy interests in the Document because it contains sensitive information related to [redacted]—issues that, if disclosed, could harm Facebook by giving competitors a window into Facebook's decisionmaking. *See Anthem, Inc.*, 2017 WL 8893757 (noting a private company's interest in sealing documents that would "provide competitors with unjustified insight into" the company's business practices). The District, on the other hand, has no specific or cognizable interest in disclosure, but rather seeks to publish the Document in the ordinary course of its litigation against Facebook. But as the D.C. Court of Appeals has recognized, "one party should not be permitted to force otherwise protectable discovery material into public view simply by attaching some of it to a motion lodged with the court." *Mokhiber*, 537 A.2d at 1111.

5. The possibility of prejudice to those opposing disclosure. Facebook would be prejudiced by disclosure in at least two ways. First, as noted, disclosure of the Document would subject Facebook to commercial disadvantages given the sensitive business contents of the Document. *Supra* p. 6. Second, "disclosure of the documents will lead to prejudice in future litigation to the party seeking the seal" because Facebook is engaged in other ongoing litigation about the same topics in which this document has not been publicized.[3] *Prospect Waterproofing*, 818 F. Supp. 2d at 68; *see Hubbard*, 650 F.2d at 321 (finding that "the possibility of prejudice to the defendants by sensational disclosure" may weigh in favor of sealing the documents when the defendants have yet to be tried in separate litigation).

6. The purpose for which the Document was introduced. The final factor also weighs in favor of sealing the Document. The sole purpose for the District's introduction of the

[3] Facebook is also a party to several actions covering the same subject matter as this action, including *In re: Facebook, Inc. Consumer Privacy User Profile Litig.*, No. 18-md-02843 (N.D. Cal.); *Ballejos v. Facebook, Inc.*, 18-civ-3607 (San Mateo Super. Ct.); *People of the State of Illinois ex rel. Kimberly M. Foxx v. Facebook, Inc.*, No. 2018 CH 03863 (Cook Cty, Ill. Cir. Ct.).

Document is to supplement the District's deficient allegations regarding personal jurisdiction. But the District cannot submit the Document for the Court's consideration at this stage because it failed to sufficiently allege facts establishing personal jurisdiction, and extraneous documents cannot cure the Complaint's pleading deficiencies.

It's well-established that a "[p]laintiff *must allege specific facts* on which personal jurisdiction can be based." *Moore v. Motz*, 437 F. Supp. 2d 88, 91 (D.D.C. 2006) (emphasis added); *Ballard v. Holinka*, 601 F. Supp. 2d 110, 117 (D.D.C. 2009) (recognizing plaintiff's "burden to make a prima facie showing"). That rule means that plaintiffs "must *allege*"—in the Complaint, not the opposition brief—"specific facts connecting the defendant with the forum." *Family Fed. for World Peace & Unification Int'l v. Moon*, 2012 WL 3070965 (D.C. Super. Ct. June 19, 2012) (emphasis added); *see also NBC-USA Hous., Inc., Twenty-Six v. Donovan*, 774 F. Supp. 2d 277, 293 (D.D.C. 2011) ("For this Court to exercise personal jurisdiction over Lilley, NBC *must plead facts* sufficient to satisfy: (1) the District of Columbia's long-arm statute; and (2) the constitutional requirements of due process." (emphasis added)). As courts have repeatedly explained, "[i]n order to satisfy this burden, a plaintiff must establish the Court's jurisdiction over each defendant *through specific allegations in his complaint.*" *Cornell v. Kellner*, 539 F. Supp. 2d 311, 313 (D.D.C. 2008) (emphasis added). As a result, a plaintiff cannot meet its burden of demonstrating jurisdiction by merely attaching extraneous documents to its opposition to a motion to dismiss, since plaintiffs are not permitted to rely—either affirmatively or in rebuttal—on a theory of personal jurisdiction that is "divorced from the factual allegations in the complaint." *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 248 (D.D.C. 2015).

Here, the District's Complaint offered only one potential basis for personal jurisdiction over Facebook: that some Facebook users live in D.C. *See* Compl. ¶ 1. Facebook's Motion to Dismiss argued that the D.C. residency of some of its users alone was not enough to subject Facebook to personal jurisdiction in this Court. Mem. of Law in Support of Mot. to Dismiss 7-8. Rather than continue relying on that lone allegation, in its opposition to Facebook's Motion to

Dismiss, the District offered for the first time the Document as proof of a different theory of jurisdiction: that Facebook's D.C. personnel were somehow involved in Facebook's response to generalized allegations related to Cambridge Analytica. District Opp. to Mot. to Dismiss 13. But the District *did not plead any allegations relating to this contention in its Complaint*. The Document is thus completely irrelevant to opposing Facebook's argument that, as pled, the District has not met its burden to show a sufficient link between Facebook and D.C. Thus, the *purpose* for which the Document was introduced is ineffectual—the Court cannot consider the Document in support of allegations the District never pled, which further supports sealing the Document from the public record.

B. At a Minimum, Facebook Should Have an Opportunity to Propose Redactions.

Due to the other ongoing legal and regulatory proceedings in which Facebook is involved, Facebook is subject to other confidentiality obligations that could be implicated if the Document is disclosed publicly in this litigation. *Supra* pp. 8-9. Accordingly, if the Court disagrees that the Document should be placed under seal, Facebook respectfully requests that it have an opportunity to propose redactions to the public copy of the Document so that certain information remains private and confidential. *See District of Columbia v. Fraternal Order of Police Metro. Police Labor Comm.*, 33 A.3d 332, 342-43 (D.C. 2011); D.C. Code § 2-534(b).

IV. CONCLUSION

Facebook respectfully moves this Court to grant its Motion to Seal.

Dated: March 11, 2019

Respectfully submitted,

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DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK, INC., *Defendant*.	CIVIL ACTION NO.: 2018 CA 008715 B

[Defendant's Proposed] Order Granting Motion to Seal

This Court, having considered Defendant Facebook, Inc.'s Motion to Seal Attachments A and B to Exhibit 4 of the District of Columbia's March 1, 2019 Opposition to Facebook's Motion to Dismiss, this _____ day of _____, 2019, hereby

ORDERS that Defendant's Motion is GRANTED. Attachments A and B to Exhibit 4 to the District's opposition to Facebook's Motion to Dismiss are to be sealed, as well as those portions of the parties' briefs that reference or quote the contents of Attachments A or B.

_____
Judge Fern Flanagan Saddler

Copies to: all counsel of record

Rule 12-I(f) statement: There are no existing dates from a scheduling order at this time.

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK, INC., *Defendant*.	CIVIL ACTION NO.: 2018 CA 008715 B Judge Fern Flanagan Saddler Next Court Date: March 22, 2019 Event: Initial Conference

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, I caused a redacted copy of the foregoing to be served upon all counsel of record via CaseFileXpress, and an unredacted copy of the foregoing to be served on all counsel of record via email, and contemporaneously filed paper courtesy copies of both filings with chambers.

Dated: March 11, 2019

Respectfully submitted,

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CERTIFICATE OF EFFORTS TO OBTAIN CONSENT

Pursuant to Superior Court Rule of Civil Procedure 12-I, 26(h)(1) and 37(a)(1)(B), I hereby certify that Facebook ascertained whether Plaintiff would consent to the relief sought before filing this motion. Counsel for Facebook and the District discussed the motion and possible resolution on March 5 and 8, 2019. Despite diligent efforts, consent could not be obtained.

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Respectfully submitted,

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